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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TIMOTHY SAILORS, Plaintiff and Respondent, v. CITY OF FRESNO et al., Defendants and Appellants.	F075577 (Super. Ct. No. 14CECG00069) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Pagliero & Associates, James R. Pagliero and Candace M. Pagliero; Clapp Moroney Vucinich Beeman Scheley, Christopher J. Beeman, Elizabeth Rhodes, and Warren Klein; Yukevich Cavanaugh, James J. Yukevich, Patrick J. Cimmarusti, and Nicholas J. Hoffman for Defendants and Appellants.

Hamparyan Injury Lawyers, Robert Hamparyan and Laura M. Sasaki; Law Office of Robert Hamparyan, Robert Hamparyan and Laura M. Sasaki; Dowling Aaron, Stephanie Hamilton Borchers and Trevor P. Goosen; Baradat & Paboojian, Stephanie Hamilton Borchers; The May Firm, Robert May and Garrett May, for Plaintiff and Respondent.

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Plaintiff Timothy Sailors was severely injured when he tripped and fell in the parking lot of the Fresno Convention and Entertainment Center (the convention center), which was owned by defendant City of Fresno (city) and managed by defendant SMG Holdings, Inc. (SMG) (collectively, defendants). He sued the city on a theory of dangerous condition of public property, and both defendants on a theory of general negligence. The trial court granted defendants' motions for summary judgment, concluding that the damaged spot in the pavement on which Sailors tripped was trivial as a matter of law, and that Sailors had not produced evidence sufficient to create a triable question of whether the lighting in the parking lot was dangerously dim.

The court granted Sailors's motion to tax costs in part, and awarded defendants their costs as taxed. It denied defendants' additional motion pursuant to Code of Civil Procedure section 2033.420 to recover the costs (including attorneys' fees) of proving facts Sailors denied during discovery in his responses to defendants' requests for admission.

Sailors appeals from the ruling granting summary judgment for defendants. He also appeals from the post-judgment order awarding and taxing costs, arguing that the amount taxed was too small because of a mathematical error, and that another plaintiff—Sailors's former employer, Reef-Sunset Unified School District (Reef-Sunset)—should have been included in the order as a co-obligor with joint and several liability for the award. Defendants appeal from the order denying costs of proof under Code of Civil Procedure section 2033.420.[1]

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[1] Sailors's merits appeal is case No. F074944 (which includes the previously consolidated case No. F075872). Sailors's costs appeal is case No. F075470. Defendants' costs appeal is case No. F075577. We have not consolidated all these appeals under a single case number. Instead, having heard and considered the three appeals together, we issue three identical opinions, one under each number (except for case No. F075872, which, having been consolidated previously, is subsumed under case

We affirm the summary judgment and the order denying defendants' motion for costs of proof. We modify the costs award to correct the mathematical error, but we cannot grant any relief against Reef-Sunset, as it is not a party to these appeals.

FACTS AND PROCEDURAL HISTORY

I. Pleadings

Sailors filed his first amended complaint against defendants on April 14, 2014. It alleged that on April 22, 2013, Sailors was walking in the convention center parking lot when he stepped in "a large pot hole" he had not seen, tripped, and hit his head on a parked car, causing severe injuries. Against the city, the complaint alleged one cause of action for a dangerous condition of public property within the meaning of Government Code section 835. Against both defendants, it alleged one cause of action for negligence. The complaint prayed for economic and noneconomic damages.

At the time of the accident, Sailors was employed as a teacher by Reef-Sunset. He was in Fresno with students to participate in a conference of the Future Farmers of America (FFA) at the convention center. Reef-Sunset paid Sailors's workers' compensation claim based on the accident, and filed a subrogation action against defendants to recover the payout. That action was consolidated in the trial court with Sailors's action. Defendants filed a cross-complaint against FFA, alleging that it was obligated to defend, indemnify, and provide insurance for defendants according to provisions of the contract under which it was using the convention center. Sailors added FFA as a defendant. Only the city, SMG, and Sailors are parties to these appeals.

II. Summary Judgment Motions

The city, SMG, and FFA filed motions for summary judgment or summary adjudication against Sailors and Reef-Sunset. Future Farmers of America filed a motion

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No. F074944). In each appeal, we take judicial notice of the appellate record submitted in the other appeals.

for summary judgment against the city and SMG. The motion filed by FFA is not at issue in these appeals. The motions filed by the city and SMG were identical, so we will refer to them simply as defendants' summary judgment motions.

Defendants' summary judgment motions argued that Sailors was unable to produce evidence sufficient to establish triable questions about whether the accident was caused by a dangerous condition consisting of the damaged spot in the pavement, the level of lighting in the parking lot, or those two factors in combination. Regarding the damaged spot, the motions argued more specifically that it was trivial as a matter of law; therefore it could not constitute a dangerous condition and its presence could not give notice of a dangerous condition.

Opposing the motions, Sailors maintained the evidence would allow the jury to find the damaged spot was in reality a pothole deep enough to create a substantial trip hazard, and the lighting conditions fell below objective standards of safety for walking in parking lots. He further argued that the combination of the two factors, the pothole and the insufficient lighting, precluded a finding that the defective condition was trivial as a matter of law.

III. Evidence Submitted by the Parties Supporting and Opposing the Summary Judgment Motions

A. Photographs of the Damaged Spot

Photographs submitted by both sides showed the nature of the damaged spot in the pavement. The spot was situated on the west side of the parking lot, near the last row of parking spaces before the access lane that runs along the sidewalk in front of the convention center buildings, in the path from the place where Sailors parked to the entrance of the Selland Arena, the building to which he was heading. The topmost layer of the asphalt had been broken down and worn away in this spot, exposing the underlying layer and leaving a shallow depression. The outline of the spot was roughly rectangular

or trapezoidal, with a long axis running approximately east to west and a short axis running approximately north to south. It was about 26 inches long and 13 inches wide.

B. The Night of the Accident

The parties submitted portions of the transcripts of Sailors's deposition, in which he described the accident. He testified that on April 22, 2013, he had been an agriculture teacher and an advisor for his school's chapter of FFA for 28 years and had been to the annual conference at the convention center many times. He was chaperoning four high school students that evening: Damian H., Amanda P., Anysa P. and Rosa M. Sailors's adult son, Glenn Sailors, was also with him. They ate dinner at a pizza parlor and then drove to the convention center in a school truck for a concert, leaving the pizza parlor between 8:00 and 8:30 p.m., and arriving at the convention center parking lot about 20 minutes later.

It was no longer twilight, but was instead fully dark when they arrived. The parking lot lighting, which all came from a single pole in the parking lot, was turned on when they arrived at the parking lot. There were multiple bulbs in the fixture at the top of the pole, but Sailors did not remember how many there were or how many were lighted. He said the light "wasn't very bright." Sailors estimated that it took five minutes or less to proceed from the ticket booth at the entrance to the parking lot to the space where he parked the truck.

After he parked, the others got out and began walking toward the convention center while he locked up the truck. The students went first, and then Glenn. Sailors brought up the rear. Sailors said that as he walked, "I … [was] scanning the path that I was taking," looking out for the kids and for traffic. He estimated that about five minutes elapsed between the time he parked the truck and the time he reached the spot where he fell.

As Sailors neared the convention center buildings, he put his left foot down into the damaged spot in the pavement, which he called a pothole. As he did so, he was still "scanning ahead of" himself, "to see the cars and where the students were ahead of me." He said that with the step down into the damaged spot, he "went into kind of a shock because when you change elevation, it kind of throws you off balance." Attempting to regain his balance, he brought his right foot forward, but caught the toe of his right boot on the edge of the damaged spot and fell. On the way down, he struck his head on a parked car. He never saw the hole, before or after the fall. He called out to Glenn, who called 911.

Glenn also described the fall in his deposition testimony. He was walking ahead of his father. Just before it happened, he turned around to wait for his father to catch up. "[A]ll of a sudden I just see him stumble on something, I see him trying to catch himself, and then he goes down and he hits that bumper of the car." Sailors took two to four steps trying to catch himself after the initial stumble. After he fell, Sailors told Glenn he could not feel his legs and needed an ambulance.

Two days before the accident, according to Sailors's deposition testimony, he bought a new pair of boots. He had no memory of telling anyone at the time that it was the new boots that caused him to trip.

Defendants submitted deposition testimony by ambulance personnel who said Sailors told them he tripped on his new boots. The paramedic testified that Sailors said he had new boots and was breaking them in, and fell because he tripped on them. Sailors did not mention a pothole and was "very particular about the boots" being the cause. The emergency medical technician testified that Sailors gave a similar account to her.

Defendants submitted deposition testimony by hospital personnel who also said Sailors told them he tripped because of, or possibly because of, his new boots. An emergency room doctor and an emergency room nurse testified that Sailors said this

when he was brought to the emergency room on the night of the accident. A physician's assistant said Sailors made a similar remark while he was still hospitalized two days later. Sailors did not mention a pothole or any other additional cause of the accident.

C. Description, Measurement, and Expert Analysis of the Damaged Spot

Defendants relied on the testimony of a number of experts describing the damaged spot in the pavement. Robert Hampson, an investigator retained by Reef-Sunset, testified at a deposition. He inspected the site of the accident on May 9, 2013, and again on August 1, 2013. He measured the depth of the damaged spot in the pavement and found that it was between one-quarter of an inch and three-eighths of an inch.

Defendants submitted a declaration by Michael Mayda, an expert retained by them in "the field of visibility analysis and photogrammetry." Based on a photogrammetric analysis of photographs taken by Hampson in 2013, Mayda concluded that the damaged spot in the pavement was from one-eighth of an inch to 3/16 of an inch deep. Mayda inspected the parking lot himself on April 8, 2015, and May 3, 2016. His own measurements confirmed that the damaged spot was one-eighth of an inch to 3/16 of an inch deep, and was 3/16 of an inch deep at the forward edge on which Sailors said he caught the toe of his boot. Mayda described that edge as "gently sloped." The parking lot had been sealed with a seal coat since the day of the accident, however. In photographs taken by Hampson before the seal coat was applied, the edges of the damaged spot appear nearly vertical.

Defendants also submitted a declaration by their expert William Neuman, an engineer who specialized in traffic safety, including pedestrian walkway safety. Neuman inspected the parking lot on several occasions in 2014, 2015, and 2016. According to his measurements, the damaged spot in the pavement was between 3/16 of an inch and one-quarter of an inch deep at each edge and no more than half an inch deep at any point. Like Mayda, Neuman pointed out that a seal coat had been applied to the parking lot after

the accident. Neuman explained that the seal coat was thin, like a coat of paint, and would not have been more than 1/32 of an inch thick. Moreover, since the seal coat was applied both to the bottom of the damaged spot and the surrounding surface, it would not have changed the depth of the spot. Neuman did not comment on the possible effect of the seal coat on the profiles of the edges of the spot, which he described as gradual slopes of no more than 50 percent (one unit of rise for each two units of run).

Neuman declared that he bought boots of the same make and style as the new boots Sailors was wearing at the time of the accident. He found that the boots had "toe-spring" of half an inch. Toe-spring, the upward curvature of the sole toward its tip, is a general feature of shoes. It raises the toe of the shoe off the ground slightly. Neuman took photographs showing that the boots' toe-spring was higher than the lip of the damaged spot when the boots were flat on the bottom of the spot. Neuman wore the boots, walked on the damaged spot in the pavement, and tried to get his toe caught on the edge. He could not do it.

Neuman concluded that the damaged spot did not constitute a substantial tripping risk for people walking in the parking lot.

Sailors submitted a declaration by Zachary Moore, an engineer with expertise in safety and accident investigations. Moore inspected the parking lot and found that the damaged spot at the site of the accident "was uneven, jagged and contained abrupt height differentials." He measured its depth and found it to be "up to 13/16" deep in several locations." He also stated that a number of points in the damaged spot exhibited "height differentials of over 0.50[of an inch]." These statements were illustrated by photographs showing rulers being used to measure these depths, but the poor quality of the photographs as they appear in the appellate record makes it impossible to read the rulers, so we do not know the precise meaning of "*up to* 13/16[of an inch]" or "*over* 0.50[of an inch]." In its order on the summary judgment motions, the trial court wrote that there

was only one measurement of 13/16 of an inch (the only one greater than one half inch); this "appears to be of the deepest crevice of the defect," and "no foot or shoe could fit in such a crevice." In his briefs in these appeals, Sailors does not dispute this characterization.

Moore opined that these measurements showed the damaged spot presented a "significant trip hazard for pedestrians." In support of this view, he cited two sources. The first was a 1966 article from the Journal of the American Physical Therapy Association, titled "The Vertical Pathways of the Foot During Level Walking." The article states: "For free speed walking the mean minimal toe-floor clearance was 1.4 cm" in experimental trials with 30 adult male subjects. (Journal of the American Physical Therapy Association, *The Vertical Pathways* (June 1966) pp. 585, 588.) This measurement is equal to 0.55 of an inch. The average subject's toe thus would clear any obstacle rising less than 0.55 of an inch from the ground. The term "free speed walking" was not defined in the article or in Moore's declaration.

The second source Moore cited was a document titled "Standard Practice for Safe Walking Surfaces," published by the American Society of Testing and Materials. The document states that its provisions are "intended to provide reasonably safe walking surfaces for pedestrians wearing ordinary footwear." (American Society of Testing and Materials, *Standard Practice for Safe Walking Surfaces* (2010) p. 1.) It "covers design and construction guidelines and minimum maintenance criteria for new and existing buildings and structures," and "addresses elements along and in walkways including floors and walkway surfaces, sidewalks, short flight stairs, gratings, wheel stops, and speed bumps." (*Ibid.*) It includes the following provisions:

"5.2 *Walkway Changes in Level:*

"5.2.1 Adjoining walkway surfaces shall be made flush and fair, whenever possible for new construction and existing facilities to the extent practicable.

"5.2.2 Changes in levels up to 1/4 in. (6 mm) may be vertical and without edge treatment ….

"5.2.3 Changes in levels between 1/4 and 1/2 in. (6 and 12 mm) shall be beveled with a slope no greater than 1:2 (rise:run).

"5.2.4 Changes in levels greater than 1/2 in. (12 mm) shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards, or ordinances, or all of these. [¶] … [¶]

"5.7 *Exterior Walkways:*

"5.7.1 Exterior walkways shall be maintained so as to provide safe walking conditions.

"5.7.1.1 Exterior walkways shall be slip resistant.

"5.7.1.2 Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven, or cracked to the extent that pieces may be readily removed.

"5.7.2 Exterior walkways shall be repaired or replaced where there is an abrupt variation in elevation between surfaces. Vertical displacements in exterior walkways shall be transitioned in accordance with 5.2.

"5.7.3 Edges of sidewalk joints shall be rounded." (American Society of Testing and Materials, *Standard Practice for Safe Walking Surfaces* (2010) pp. 1-2.)

Moore's ultimate conclusion about the damaged spot was that it had a "height differential … of approximately 13/16[of an inch]" and therefore presented a significant trip hazard for pedestrians.

Sailors submitted an expert declaration by James Cantrell, whose expertise was on the subject of property management. He reviewed witness depositions, photographs, and other documents, and inspected the parking lot in person. He concluded that the parking

lot had "many potholes and cracks that needed repair" and fell below industry standards; also that defendants lacked procedures, training, and assigned personnel for inspecting the parking lot's pavement. The convention center's general manager, William Overfelt, had asked for money to be included in his budget for parking lot repairs, but no repairs took place. Cantrell also described deposition testimony in which Overfelt said he once ordered the repair of a hole in the pavement near a loading dock adjacent to the parking lot, because he was concerned that employees working there would trip and fall. The hole was about the size of a sheet of paper and about half an inch deep.

D. Description, Measurement and Expert Analysis of the Lighting

Neuman's declaration also discussed the lighting conditions in the parking lot. All the nighttime lighting for the parking lot came from a fixture holding ten 1000-watt bulbs at the top of a pole 84 feet tall, located 150 feet from the place where Sailors fell.

On the night of April 8, 2015, Neuman used a light meter to measure the light falling on the place where Sailors fell. Anysa P., one of the students with Sailors on the night of the accident, testified in a deposition that only five or six of the light bulbs were lit at the time, so Neuman took measurements with some of them turned off. He obtained the following measurements:

Number of bulbs lit	**Illumination in foot-candles**
10	1.05
9	0.92
8	0.85
7	0.70
6	0.55
5	0.50

Neuman measured the light again on May 3, 2016. His declaration reports only one measurement: 0.82 foot-candles. It further states that, if the same amount of moonlight had been present on May 3, 2016, as was present on the night of the accident

(91 percent of a full moon), the measurement would have been 0.84 foot-candles, i.e., 0.02 more than the actual measurement. The declaration does not state how many bulbs were lit, but presumably it was all 10.

Neuman's declaration did not offer any explanation of why his later measurement failed to match his earlier ones. It did state, however, that the May 2016 measurement was taken after all light from the sun was gone. Regarding the April 2015 measurements, Neuman stated only that the sun was below the horizon when it was taken, leaving open the possibility that there was still some sunlight in the sky. Since Sailors testified in his deposition that it was fully dark by the time he arrived at the parking lot, and since we are obliged to consider the facts in the light most favorable to the nonmoving party when reviewing an order granting summary judgment, we must suppose that the May 2016 measurement (0.84 foot-candles, including the allowance for moonlight) for 10 bulbs is more accurate.

Neuman cited two sources for minimum standards for parking lot illumination. First was the fifth edition of a book titled *The Dimensions of Parking* published by the Urban Land Institute. Under the heading "Basic," this book stated a minimum standard of 0.2 foot-candles at ground level for parking lots. Under the heading "Enhanced Security," it stated a minimum standard of 0.5 foot-candles. (Urban Land Institute, *The Dimensions of Parking* (5th ed.) p. 131.) These were standards promulgated by the Illuminating Engineering Society of North America (IESNA) in a publication issued in 1998. According to Neuman, the purpose of the enhanced security standard was to deter crime, not to create safe walking conditions. The appellate record includes pages from the ninth edition of *The IESNA Lighting Handbook*. There it is stated that the "Basic" level of 0.2 foot-candles is "[f]or typical conditions," while the "Enhanced Security" level of 0.5 foot-candles is appropriate where "personal security or vandalism is a likely

and/or severe problem." (Illuminating Engineering Society of North America, *The IESNA Lighting Handbook* (9th ed. 1998) pp. 22-21, 22-23.)

The second source cited by Neuman was the sixth edition of the *Traffic Engineering Handbook* published by the Institute of Transportation Engineers. This source merely reiterated the standards of the IESNA, however. (Institute of Transportation Engineers, *Traffic Engineering Handbook* (6th ed.) p. 517.)

Neuman also cited the City of Fresno's Parking Manual, adopted April 1, 1987, which stated: "A lighting system shall be installed on all off-street parking areas. This lighting system shall be designed to produce a minimum maintained average light level of one-half (1/2) foot-candle on the entire parking facility's horizontal surface." (City of Fresno, *Parking Manual* (April 1987) Part I, p. 5.) The manual did not say whether this light level was intended to reflect a minimum standard for safe walking, for crime deterrence, or both. Fresno City Manager Bruce Rudd stated that the Parking Manual adopted in 1987 applied only to parking lots built in 1987 or later. The parking lot at the convention center was built in 1962.

Based on his measurements, Neuman concluded that the lighting in the parking lot at the time of the accident satisfied the applicable standard regardless of whether that standard was 0.2 or 0.5 foot-candles. Mayda was present at the inspection on May 3, 2016. Relying on the same measurements and publications, Mayda endorsed Neuman's conclusions.

Moore's declaration also described light-meter measurements taken at night at the accident location. His approach to measuring the light focused on the fact that when the light bulbs were first turned on, they warmed up for a few minutes before reaching their full brightness. He obtained the following measurements with all 10 bulbs turned on:

Time in minutes	**Illumination in foot-candles**

0	0.047
1	0.111
2	0.279
3	0.386
4	0.398
5	0.407
6	0.421
7	0.422
8	0.420
9	0.424
10	0.415
28	0.425

Moore's declaration next stated that the light level at the time of the accident "may have been as low as 0.189 foot-candles." This assertion was followed by a reference to the eyewitness testimony that only five or six of the bulbs were lit. The declaration did not, however, explain how the figure of 0.189 foot-candles was derived. Moore did not take any measurements with fewer than 10 bulbs lit.

The declaration also advances an "opinion that the power switch … may not have been activated until at or immediately after the time" of the accident. This opinion was based on "video footage of the 'warm-up phase'" of the light fixture that Moore had viewed. Watching the video, he observed that the light bulbs warmed up at different rates during the first minute, and that "several" bulbs were "functionally-delayed" in warming up during that time. Moore declared that bulbs having different brightnesses because they were warming up would be "consistent with" the eyewitness testimony that some of the bulbs were not lit. (The notion that the lights were switched on at the same time as or immediately following the accident, however, is not consistent with Sailors's own testimony that the lights were on when he drove into the parking lot.)

On the subject of standards, Moore referenced the 0.5 foot-candle figure for parking lots set forth in the city's 1987 Parking Manual, as well as the 0.5 foot-candle figure for "Enhanced Security" in parking lots stated in *The IENSA Lighting Handbook*.

Moore did not mention the 0.2 foot-candle "Basic" figure found on the same page of the same handbook.

Moore also cited another portion of *The IENSA Lighting Handbook* not specifically related to parking lots. Within a chapter titled "Emergency, Safety, and Security Lighting" was a section headed "Lighting for Safety." This section stated: "Lighting for safety is a concern that must be addressed in both outdoor and indoor locations. People must be made aware of hazards such as curbs, steps, sloped walkways, and obstacles in one's path." (Illuminating Engineering Society of North America, *The IESNA Lighting Handbook* (9th ed. 1998) p. 29-16.) Illustrating the section was the following table:

Figure 29-2. Illuminance Levels for Safety

Hazards Requiring Visual Detection	Slight		High	
Normal Activity Level	Low	High	Low	High
Illuminance Levels[2] Footcandles	0.5	1	2	5

The handbook stated that these levels were "regarded as absolute minima for safety alone" and represented "absolute minimum illuminances at any time and location where safety is related to visibility." (Illuminating Engineering Society of North America, *The IESNA Lighting Handbook* (9th ed. 1998) pp. 29-16, 29-2.) Neither Moore's declaration, nor the portions of the handbook included in the appellate record,

[2] The table showed the illuminance levels in lux as well as foot-candles. The lux figures are omitted here.

offer any explanation of how these general safety standards relate to the specific (and lower) safety standard for parking lots set forth elsewhere in the same work.[3]

Based on his measurements, the standards cited by him, and his analysis, Moore concluded that the lighting was inadequate at the time and place of the accident.

In addition to the expert declarations, Sailors relied on the deposition testimony of percipient witnesses about the lighting in the parking lot on the night of the accident. Natalie G., one of the students present when the accident took place, testified that she "kind of noticed it is somewhat dark for a parking lot." (But she also gave an affirmative answer when asked whether she could "look down and see the surface [of the parking lot] clearly" as she stood near Sailors after he fell: "I think you kind of could, yes. I mean, I would be able to, I think but I can't really remember everything in detail." Glenn Sailors testified that he did not see what caused his father to trip because it was too dark: "At the time, I mean, it was dark, so I had really no idea, like I couldn't see anything, like it was just so pitch black to me." In spite of this, Glenn was able to testify about a number of details he saw at the time. "I saw the whole thing happen," he said. Walking ahead of his father, he turned back to wait for him, and saw him coming. He saw that the first row in the parking lot, near where he was standing, was full of cars. He saw his father stumble, try to catch himself, put his arms out, take two to four steps, and fall, striking his head on the bumper of a parked car. He saw that the place where his father struck the

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3 Moore also cited an ordinance, Fresno Municipal Code section 15-2015, which provides that "[i]n Multi-Family, Mixed-Use, and Commercial Districts, exterior lighting with an intensity of at least 0.25 foot-candles at the ground level shall be provided for a secure nighttime pedestrian environment by reinforcing entrances, public sidewalks and open areas with a safe level of illumination." This ordinance, however, is inapplicable on its face to the convention center's parking lot. It states that it is applicable to new lights, demolition and reconstruction of a site, new developments, building additions, addition of residential units, work done under a discretionary permit, changes of occupancy and condominium conversions. There was no evidence that any of these things were involved in this case.

bumper was on the car's passenger side. He saw that the parked car was backed fully into its parking spot, with the white lines on the pavement extending out past the bumper, but not by much. Damian H., a student, answered "[m]aybe" when asked whether he had "ever come to believe that the lighting played any role" in the accident. When asked why, his answer, in full, was "Because, well, if it's dark and you can't see what's in front of you then …." He affirmed, however, that he was walking along the same route as Sailors, and was able to see what was in front of him. Pamela Brem, a teacher, testified that she observed that "[t]here was not enough light" in the parking lot *in prior years* when she attended the FFA conference.

As indicated above, Sailors himself testified that the parking lot lights were on when he drove into the parking lot; and Anysa P. testified that she saw four or five of the 10 light bulbs unlit at the time of the accident. Alex Mora, an SMG employee, stated in a declaration that, according to SMG's records, the last work performed on the light fixture, before the accident, happened in 2011, and the first work performed on it after was in 2014. In 2011, three light bulbs were replaced, and in 2014, two light bulbs were replaced. This suggested that no more than two bulbs were burned out on the night of the accident in 2013.

The declaration of Cantrell, the property management expert, addressed issues related to lighting. Cantrell declared that when he inspected the parking lot for purposes of this litigation, he observed that the 10 light bulbs did not all illuminate and reach full brightness at the same time. Instead, for the first minute after the switch was flipped, only five or six bulbs appeared to be lit at all. After about 12 minutes, all the bulbs were lit, but six of them were brighter than the other four. All 10 had reached full brightness after about 20 minutes. Cantrell opined that the likely explanation was that some of the bulbs were older than the others. He said the phenomenon he observed was "consistent with" the testimony by Anysa P. that only five or six bulbs were lit.

Cantrell also opined that the convention center lacked proper procedures for lighting the parking lot at night. He stated that SMG had no written or oral policies regarding who was responsible for turning on the parking lot lights for night events, or what time they should be turned on. The switch was equipped with an automatic timer, but SMG did not use the timer.

Cantrell surmised that the light fixture "may not have been on" when Sailors fell. His declaration did not explain this inference, but the suggestion appears to be that the lights were switched on just as or just after Sailors fell; and when Anysa P. approached the scene of the accident, she saw the bulbs starting to warm up, with half of them still not lit at all. This was similar to the hypothesis stated by Moore. Again, of course, this hypothesis disregards Sailors's own testimony that the lights were on when he drove into the parking lot.

E. Prior Trip and Fall Incident

Sailors relied on evidence of a prior trip and fall in the convention center parking lot. Betty Pash submitted a claim form to the city stating that on February 11, 2012, at 7:15 p.m., she parked in the convention center parking lot and began walking toward the William Saroyan Theater. On the way, she stepped in a pothole and fell, sustaining injuries. She could not see the pothole because there was inadequate lighting in the parking lot. Cantrell declared that defendants should have investigated and remedied the lighting conditions in the parking lot after this claim was made. In opposing the summary judgment motions, Sailors contended that this incident placed defendants on notice that the parking lot had insufficient lighting.

IV. Rulings on Summary Judgment Motions

The trial court granted the summary judgment motions on October 20, 2016. It concluded that the experts' measurements found the damaged spot in the pavement to be no more than half an inch deep. Regarding the one measurement of 13/16 of an inch, the

court stated, "This measurement appears to be of the deepest crevice of the defect …, which would largely be irrelevant because no foot or shoe could fit in such a crevice." The court then concluded that the damaged spot was a trivial defect as a matter of law. It cited, among other cases, *Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559 (*Stathoulis*), in which the Court of Appeal observed that California courts have been reluctant to apply the trivial defect doctrine when the depth of a depression exceeds one inch. (*Id.* at p. 568.) The trial court ruled that, in this case, the damaged spot was a trivial defect even assuming its maximum depth was 13/16 of an inch. It also rejected the contention that even if the defect was shallow, it was not trivial because it had an irregular shape and jagged edges.

The trial court next pointed out that, under the trivial defect doctrine, a defect that otherwise would be trivial as a matter of law would not be trivial if the surrounding circumstances made it hazardous despite its minimal character; Sailors argued that the damaged spot was not trivial because the nighttime lighting in the parking lot was inadequate, even if the spot would be trivial with adequate lighting. The trial court concluded that the applicable standard of care called for lighting at the level of 0.2 foot-candles. It rejected the standard of 0.5 foot-candles, finding the authorities on which it was based to be inapplicable in this case. Sailors did not submit evidence showing the light level was below 0.2 foot-candles, and could only arrive at a figure below that level by speculating that the bulbs were warming up when Sailors fell and had been on for less than two minutes. Consequently, Sailors failed to raise a triable question of whether the lighting conditions made nontrivial a defect that was trivial otherwise.

The court entered a judgment for defendants on October 31, 2016.

V. Costs Motions

On January 30, 2017, defendants filed a memorandum of costs and a motion for costs. Defendants requested an award of $305,833.56. Of this amount, $54,865.88 was

requested for nondiscretionary costs awardable under Code of Civil Procedure sections 1032 and 1033.5, subdivision (a). The remainder, $250,967.68, was for attorneys' fees and costs awardable at the court's discretion under Code of Civil Procedure sections 1033.5, subdivision (c), and 2033.420, including $5,056.46 for the cost of preparing the motion.[4]

Code of Civil Procedure section 2033.420 gives the trial court discretion to award, against a party that has denied requests for admission, and to the party that served the requests for admission and subsequently proved the truth of the matters denied, the costs incurred in making that proof, including attorneys' fees. Code of Civil Procedure section 1033.5, subdivision (c)(4), gives the trial court discretion to make cost awards that are neither mandated by Code of Civil Procedure section 1033.5, subdivision (a), nor prohibited by Code of Civil Procedure section 1033.5, subdivision (b). There do not appear to be any grounds asserted in this case for an award of costs under Code of Civil Procedure section 1033.5, subdivision (c)(4), over and above the grounds asserted under Code of Civil Procedure section 2033.420—i.e., that Sailors's denials of defendants' requests for admissions forced defendants to incur costs in proving matters as to which Sailors was not prepared to carry his burden, and thus should have admitted.

Sailors filed an opposition to the motion for the discretionary costs. He filed a motion to tax the nondiscretionary costs.

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[4] There was a discrepancy between the figures set forth in the memorandum of costs and those set forth in the motion. The memorandum indicates that the nondiscretionary costs were $54,865.88, as stated above. The motion, by contrast, indicates that those costs were $50,491.85. The difference is $4,374.03, which is equal to the amount entered on line 13 of the costs memorandum summary page. We have not attempted to determine which figure is actually correct. Instead, we assume $54,865.88 was the amount actually intended to be requested for nondiscretionary costs, as this was the figure on which the amount the court award was based (the award being equal to that amount less the taxed amount). The parties have not referred to the discrepancy or asked us to resolve it.

On February 28, 2017, the trial court denied defendants' motion for the discretionary costs and attorneys' fees based on Sailors's denial of defendants' requests for admission. In its written ruling, the court explained that some of the matters defendants asked Sailors to admit were never actually proved by defendants. As to other matters, Sailors denied the requests for admission in the reasonable belief that he could have prevailed on them at trial.

The court granted Sailors's motion to tax costs in part on March 28, 2017. In its written order, the court explained that it would tax several items, as follows:

Item	**Amount**
Deposition transcripts of Eller and Otto	$2,565.60
Service of process in indemnity and insurance actions	$252.00
Medical witness fees	$1,733.33
Copying—workers' compensation file	$201.71
Copying—exhibits	$1,679.29
Copying—photographs	$368.54

The sum of these amounts is $6,800.47. The total amount the court ordered taxed, however, was only $4,550.93, a difference of $2,249.54. The record contains no explanation of this discrepancy, which is the basis of Sailors's appeal from the costs order—but the amount of the discrepancy is equal to the sum of the last three items in the table above, which evidently were omitted from the court's calculation.

The trial court filed an amended judgment on April 14, 2017. It stated that Sailors took nothing from defendants and defendants were awarded costs of $50,314.95 ($54,865.88 - $4,550.93) against Sailors.

DISCUSSION

I. Sailors's Merits Appeal

Sailors maintains that the trial court erred in granting defendants' summary judgment motions because there were triable issues of material fact regarding whether or not the damaged spot in the pavement and the lighting conditions combined to create a dangerous condition on the property. We disagree.

A. Legal Background

1. *Summary Judgment Standards and Standard of Review*

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) We view the facts in the light most favorable to the nonmoving party. (*Sheffield v. Los Angeles County* (2003) 109 Cal.App.4th 153, 159.) A moving defendant can establish its entitlement to summary judgment by either (1) demonstrating that an essential element of the plaintiff's case cannot be established, or (2) establishing a complete defense. (Code Civ. Proc., § 437c, subd. (o).)

2. *Dangerous Condition of Public Property and Premises Liability*

Government Code section 835 provides for a cause of action against a public entity for injury caused by a dangerous condition of public property:

> "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> "(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> "(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Government Code section 830, subdivision (a), defines "dangerous condition" for purposes of this cause of action: "'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

This definition does *not* require the plaintiff himself or herself to have used due care. The definition of "dangerous condition" is satisfied—regardless of the plaintiff's actual behavior—if the property poses a substantial risk of injury even to persons who are using the property with due care in a reasonably foreseeable manner. In other words, a dangerous condition exists whenever the required risk to these hypothetical persons would exist. Liability thus extends to persons generally, not just those using due care. (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 798-799; *Callahan v. City & County of San Francisco* (1967) 249 Cal.App.2d 696, 702-703.) A plaintiff's actual lack of due care is accounted for through a separate analysis, namely, that of comparative

fault. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1458-1459; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768-769.)

The elements of a cause of action for a dangerous condition of public property may be summarized thus:

(1) The property is owned or controlled by a public entity.

(2) At the time the plaintiff was injured, the property was in a dangerous condition, meaning:

(a) it posed a substantial risk to persons who

(b) used the property with due care

(c) in a reasonably foreseeable manner.

(3) The dangerous condition proximately caused the plaintiff's injury.

(4) The risk of the kind of injury actually incurred was reasonably foreseeable.

(5) The public entity had actual or constructive notice of the dangerous condition, or a public employee negligently or wrongfully created it.

A cause of action for premises liability against a private owner or possessor of property has the same fundamental elements as a cause of action for negligence: a duty of care, breach of the duty, and proximate causation resulting in injury. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) Proving these elements in a premises liability case generally involves a showing analogous to the showing required to prove a cause of action for a dangerous condition of public property. (*See, e.g., Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) The parties do not claim there are any differences between the two causes of action that are pertinent to the issues in this appeal.

The parties' arguments on appeal focus primarily on one question, which they assume is controlling with respect to both causes of action: whether Sailors submitted evidence sufficient to raise a triable question of whether the convention center parking lot

was in a dangerous condition at the time of the accident. This question depends in turn on the evidence pertaining to the damaged spot in the pavement and the lighting conditions.

3. *Trivial Defect Doctrine*

In holding that Sailors did not raise a triable question of whether there was a dangerous condition, the trial court ruled that the damaged spot was a trivial defect as a matter of law. "'[A] property owner is not liable for damages caused by a minor, trivial or insignificant defect in property.' [Citation.] Some defects are bound to exist even in the exercise of reasonable care in the maintenance of property and cannot reasonably be expected to cause accidents." (*Stathoulis, supra*, 164 Cal.App.4th at p. 566.) Further, a court can determine whether a defect is trivial as a matter of law, rather than submitting the question to a jury. This rule "'provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property.'" (*Id.* at p. 567.)

Government Code section 830.2 is a codification of the doctrine in the context of public property: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."[5]

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[5] When Government Code section 830.2 was enacted in 1963, the Law Revision Commission pointed out that the trivial defect doctrine does not actually give the trial court any powers to decide the issue of dangerousness it would not otherwise have, since evidence establishing a defect that is no more than trivial would be insufficient to prove

The trivial defect doctrine applies, and allows a case to be resolved as a matter of law on summary judgment, where on the facts presented no substantial risk of injury can reasonably be found. (*Stathoulis, supra,* 164 Cal.App.4th at p. 567.) The doctrine does not afford an affirmative defense to the landowner, but instead requires the injured plaintiff to prove the defect is more than trivial. (*Ibid.*) Consequently, if a defendant moving for summary judgment presents evidence tending to show the defect was trivial, the plaintiff opposing summary judgment must present evidence to the contrary that raises a triable question regarding the defect's dangerousness.

"The legal analysis involves several steps. First, the court reviews evidence regarding the type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law and grant judgment for the landowner." (*Stathoulis, supra,* 164 Cal.App.4th at pp. 567-568.)

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the dangerousness element of the tort in any event: "This section declares a rule that has been applied by the courts in cases involving dangerous conditions of sidewalks. Technically it is unnecessary, for it merely declares the rule that would be applied in any event when a court rules upon the sufficiency of the evidence. It is included in the chapter to emphasize that the courts are required to determine that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk is involved before they may permit the jury to find that a condition is dangerous." (Cal. Law Revision Com. com., 32 pt. 2 West's Ann. Gov. Code (2012 ed.) foll. § 830.2, p. 28.)

B. Application of the Trivial Defect Doctrine

1. Depth of the Defect

We turn first to that "preliminary analysis" of the damaged spot in the pavement. It appears that for walking surfaces, height differentials of half an inch or less are generally found to be trivial by California courts, assuming there are no additional factors increasing the danger. In *Barrett v. Claremont* (1953) 41 Cal.2d 70, the plaintiff was injured when she tripped over a ridge of material, half an inch high, that filled the joint between two sidewalk slabs. (*Id.* at p. 71.) The weather was warm, the filler material had been softened by the heat, and the plaintiff's toe got caught or stuck in it. (*Id.* at p. 74.) Our Supreme Court held the defect was trivial as a matter of law and ordered the trial court to grant the defendant's motion for judgment notwithstanding the verdict. (*Id.* at pp. 74-75.) Similarly, in *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, the plaintiff tripped on a crack in a sidewalk. The crack had a maximum elevation difference of 0.4 or 7/16 of an inch. (*Id.* at p. 925.) The Court of Appeal held that this defect was trivial as a matter of law, assuming no other conditions made the sidewalk dangerous. (*Id.* at p. 927.)

Height differentials between half an inch and one inch also have often been determined to be trivial as a matter of law absent aggravating factors. (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 721-722 [sidewalk crack creating height differential between zero and three-quarters of an inch]; *Whiting v. National City* (1937) 9 Cal.2d 163, 164, 166 [adjoining sidewalk slabs with maximum elevation difference of three-quarters of an inch]; *Balmer v. Beverly Hills* (1937) 22 Cal.App.2d 529, 529-532 [one inch maximum difference in elevation between adjoining expanses of sidewalk]; *Dunn v. Wagner* (1937) 22 Cal.App.2d 51, 53-54 [same]; *Ness v. San Diego* (1956) 144 Cal.App.2d 668, 673 [seven-eighths of an inch elevation difference between adjoining sidewalk slabs].)

But as "the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder, supra,* 71 Cal.App.3d at p. 726; see also *id.* at p. 724, fn. 5 [collecting cases involving defects one and one-half inches deep or more and finding them to be nontrivial].)

In this case, with one exception, the measurements submitted by all parties indicated that the damaged spot in the pavement was no more than half an inch deep. We agree with the trial court that Sailors produced no evidence on the basis of which the one remaining measurement, 13/16 of an inch, could be found to have had any causal role in the accident. There was no evidence that this measurement measured anything other than a narrow crack in the bottom of the depression. Sailors's testimony was that he placed his foot in the depression, lost his balance, and then fell when he caught his toe on the edge of the depression while attempting to recover. This description of the accident is not consistent with a narrow crack at the bottom of the depression being part of the cause, as the foot could not have gone into the crack and the toe was alleged to have been caught on the raised rim of the depression, not on a crack in its floor.

So far as those measurements that were related to the causes of the accident are concerned, therefore, the evidence showed the spot had a maximum depth of half an inch. Taking the difference in elevation on its own, as we do in the preliminary analysis, the case law leads us to agree with the trial court's determination that its magnitude was trivial as a matter of law.

The publications cited by Sailors's expert Moore do not alter this conclusion. The publication "Standard Practice for Safe Walking Surfaces" recommended beveling for any change in elevation between a quarter of an inch to half an inch. Here, there was no evidence that the edges of the damaged spot were beveled where they rose above a quarter of an inch, and although defendants' expert, Neuman, stated that the edges had gradual slopes after the sealant was applied, the photographs from before the sealant was

applied (and thus at the time of the accident) show edges that look roughly vertical. But we do not find any support in the case law for the view that a difference in elevation of half an inch or less is trivial only if it is gradual or sloped. The sidewalk cases in which differences of half an inch or less were found trivial appear generally to involve vertical displacements at cracks or joints. In light of that state of the law, we do not think the beveling recommendation for displacements between a quarter of an inch to half an inch can be regarded as a part of the applicable standard of care. Further, Moore never opined that an unbeveled vertical change of elevation of half an inch presented a substantial risk of injury. Instead, his opinion about the risk presented by the damaged spot was based on the premise that its maximum depth was 13/16 of an inch, a measurement that we and the trial court have found to be unrelated to the causes of the accident.

Likewise, the article about toe clearance cited by Moore did not support the proposition that a depth of half an inch presented a substantial risk of injury. Instead, it asserted that in an average gait, the toe clears the ground by more than half an inch (i.e., by 0.55 of an inch = 11/20 of an inch).

2. Additional Factors

As the cases make clear, however, the difference in elevation alone does not settle the issue. "Although the size of a crack or pothole is a pivotal factor in the determination, 'a tape measure alone cannot be used to determine whether the defect was trivial.' [Citation.] 'Instead, the court should determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate.' [Citations.] 'Aside from the size of the defect, the court should consider whether the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a

pedestrian's view of the defect.' [Citation.] The court should also consider the weather at the time of the accident, a plaintiff's knowledge of the conditions in the area, whether the defect has caused other accidents, and whether circumstances might either have aggravated or mitigated the risk of injury." (*Stathoulis, supra*, 164 Cal.App.4th at pp. 566-567.)

In some cases, the Courts of Appeal have found defects with a depth or height of half an inch or less to be not trivial, or potentially not trivial, when considered in light of all the circumstances. (See, e.g., *Kasparian v. Avalon Bay Communities* (2007) 156 Cal.App.4th 11, 17, 28-30 [quarter of an inch to 5/16 of an inch depression in sidewalk could not be found trivial without examination of other circumstances, as to which triable questions existed].)

We now turn, therefore, to the "additional factors" part of the analysis.

a. Edges

Sailors asserts that the damaged spot had jagged edges. The photographs in the record show that the spot's sides were not straight lines, but there does not appear to be, and Sailors and his experts do not suggest, anything specific about them that would increase the risk of tripping. And as we have said, although there was evidence that the edges of the spot were vertical and not sloped or beveled, the case law does not support the view that displacements of half an inch or less are nontrivial unless the edges are sloped or beveled (the reference work calling for beveling of displacements of a quarter of an inch to half an inch to the contrary notwithstanding).

Some of the cases refer to features of the physical configuration of the defect, other than its height or depth, as its "nature and quality." (See, e.g., *Stathoulis, supra,* 164 Cal.App.4th at pp. 563-564, 568-569 [because of its nature and quality—not its depth alone—defect consisting of three holes four inches apart and one inch deep not trivial as a matter of law, where plaintiff fell after getting one shoe stuck in one and then the other

shoe in another].) In this case, the evidence of the nature and quality of the damaged spot in the pavement—its size and shape, the meandering lines comprising its edges, the vertical configuration of those edges—combined with the evidence of its depth, did not raise a triable question of material fact regarding the dangerousness of the spot.

b. Lighting Conditions

The primary alleged aggravating circumstance on which the litigation focused was the lighting level in the parking lot. But Sailors did not produce evidence sufficient to raise a triable question about whether the lighting level satisfied the applicable standard of care for lighting in parking lots, as we will explain.

i. Lighting Standards

Neuman, defendants' expert, stated in his declaration that the standards endorsed by IESNA were 0.2 foot-candles and 0.5 foot-candles. Further, Neuman pointed out that 0.5 foot-candles was IESNA's standard for "enhanced security," while 0.2 foot-candles was the "basic" standard. Although Neuman did not make the point, the "enhanced security" standard of 0.5 foot-candles was not applicable to the issues raised by this case. This case involves sufficient light for safe walking, not sufficient light to deter crime or enhance security.

Neuman pointed out that the standard of 0.5 foot-candles also appeared in the city parking manual, but there is no evidence that the city adopted that standard for the sake of walking safety alone. Instead, the evidence of the IESNA reference work suggests circumstantially that it did not, and that the city's intention was that parking lots should have sufficient light for enhanced security as well as safe walking conditions. Even assuming the parking manual applied retroactively to parking lots built before 1987, it did not support the view that the standard of care applicable to this case, which does not involve security, was greater than 0.2 foot-candles.

Moore's declaration contained nothing that would show that the 0.5 foot-candle standard in the city parking manual, or the IESNA's "enhanced security" standard of 0.5 foot-candles, should have been used to determine the standard of care in this case.

It does, however, include a citation of a *different* standard of 0.5 foot-candles. This was another IESNA standard, contained in a different chapter of the same work, under the heading "Lighting for Safety." The purpose of lighting conforming to this standard was to ensure that people can see "hazards such as curbs, steps, sloped walkways, and obstacles in one's path." The 0.5 standard was for "slight" hazards in places with a "normal activity level" that is "low." (Illuminating Engineering Society of North America, *The IESNA Lighting Handbook* (9th ed. 1998) p. 29-16.)

Moore's declaration does not offer any explanation of why this standard would be applicable instead of the "basic" standard specifically for parking lots, which Moore ignored. Presumably, the point of referring to this standard is the notion that the damaged spot in the pavement might be described as an obstacle in Sailors's path that constituted at least a "slight" hazard, triggering the 0.5 foot-candle standard.

But the conclusion that the damaged spot was a trivial defect as a matter of law with respect to its depth is not compatible with that notion. It might seem like hairsplitting to say a "trivial defect" is too small even to be a "slight hazard," but we think it is not, given the context in which the concept of a slight hazard is found. A slight hazard, according to the IESNA, is one that requires more than double the illumination needed for 'basic' (i.e., safety of walking) purposes in a parking lot. Yet if a defect is trivial with respect to its height or depth, it is not actionable unless there are aggravating circumstances that make it a substantial danger. We do not see how normal lighting conditions that would be adequate absent the otherwise trivial defect can amount to an aggravating circumstance. The idea of the trivial defect doctrine is that a defect of trivial depth or height will not support a negligence action if conditions are otherwise ordinary.

The doctrine does not require the otherwise trivial defect to be *offset* by conditions that are better than usual, such as a level of lighting that is higher than that which would be sufficient if the trivial defect were not there. The rule is that a defect of trivial depth might not be trivial if there are other conditions that exacerbate the risk of harm the defect presents, not that a defect of trivial depth remains nontrivial only if there are other conditions that mitigate the risk.

For all these reasons, the evidence submitted in the summary judgment proceedings failed to show that a reasonable factfinder could find that the applicable lighting standard was greater than 0.2 foot-candles. We turn now to the evidence of what the lighting level at the time of the accident actually was: Did it fall below 0.2 foot-candles?

ii. Actual Lighting Level

Neuman took a series of measurements in April 2015 indicating that the light level went from 1.05 foot-candles for 10 bulbs, down to 0.5 foot-candles for five bulbs. These measurements apparently included a low level of after-sunset sunlight. In May 2016, Neuman took another measurement at a time when the background conditions more closely approximated those on the day of the accident, i.e., with no remaining sunlight. This measurement was 0.82 foot-candles for 10 bulbs. Neuman added that there was no moon at the time of the May 2016 measurement, but there was 91 percent of a full moon on the night of the accident. If there had been 91 percent of a full moon on at the time of the May 2016 measurement, the measurement would have been slightly higher, 0.84 foot-candles.

These figures indicate that the error arising from the sunlight present when the April 2015 measurements were taken added 0.21 foot-candles to the light that would have been present on the night of the accident (1.05-0.84=0.21), assuming the same amount of moonlight. If there was less than 91 percent of a full moon for the April 2015

measurements, the difference attributable to sunlight would be greater. If there was more than 91 percent of a full moon then, the difference attributable to sunlight would be less. But the difference would be small either way, since 91 percent of a full moon makes a difference of only 0.02 foot-candles. Thus if we assume there was no moon for the April 2015 measurements—the worst case for the sunlight-based error—the error would be 0.02 foot-candles greater, or 0.23 foot-candles.

Applying the above calculations to Neuman's April 2015 measurement for five bulbs—the smallest number of lit bulbs supported by evidence—we see that Neuman's figures support a worst-case scenario of 0.27 foot-candles (0.50-0.23=0.27). This figure is above the standard of 0.2 foot-candles, of course. So far, we do not have evidence that would raise a triable question of whether the lighting level at the time of the accident was below the applicable standard.

Did the information in Moore's declaration give rise to a triable question about whether the lighting level fell below 0.2 foot-candles at the time of the accident? We conclude it did not. Sailors testified the lights were on when he arrived at the parking lot, and that it took five minutes or less to drive from the ticket booth to his parking space. Then it took approximately five additional minutes to get out of the truck, lock it, and walk to the spot where he fell. Since five minutes "or less" could be any amount approaching zero, we will assume for the sake of argument that the total time was five minutes from the moment Sailors arrived and saw that the lights were on to the time when he fell. Moore measured a light level of 0.407 foot-candles for 10 bulbs five minutes after they were turned on. Thus if the lights had just been turned on an instant before Sailors arrived at the parking lot, they would have warmed up to 0.407 foot-candles by the time he fell, if all 10 were lighted and warming up by then. If only five were lighted by then and the other five had not started warming up at all, we could assume the level would be half, approximately 0.2, assuming there was no other light

from the sun or moon or elsewhere. (If there were other light sources, the reduction would be less than half, assuming the other sources remained constant over the five minutes.) So using Moore's figures and assuming only five bulbs were lit and had been on for only five minutes when Sailors fell, the light level would still satisfy the standard of 0.2 foot-candles.

Moore declared that the lighting level "may have been as low as 0.189 foot candles" at the time of the accident, but he did not explain how he derived that figure and we can see no way to derive it from the information in his declaration. Further, even if 0.189 foot-candles were the level when Sailors fell, that is equal to 0.2 foot-candles when rounded to one decimal point. One decimal point is as much precision as the standard is ever stated with in the sources cited by the parties' experts, so there would be no purpose in attempting to state the measured light level more precisely. So even assuming the figure is correct (despite Moore's failure to supply a foundation for it), Sailors still did not produce evidence sufficient to raise a triable question of whether the light level was too low.

Finally, Moore set forth a hypothesis according to which the light fixture was switched on at or immediately after the time of the accident. He based this theory on a video he watched, in which the light fixture was switched on and the bulbs warmed up at different rates, with the result that, during the first minute, the brightness varied substantially from bulb to bulb. Moore declared that this phenomenon would possibly explain Anysa P.'s testimony that she saw the light fixture with only five or six bulbs lit. Under this scenario, the lighting level at the moment of the accident would be 0.047 foot-candles, Moore's figure for the instant before the bulbs started to light up.

To accept this hypothetical scenario as a basis for a conclusion that the lights were off when Sailors fell would involve speculative inferences about exactly what Anysa P. saw and when she saw it, why Sailors thought the lights were on when he arrived if they

only came on as he was falling, and why no one who arrived in the truck with Sailors testified that the lights were off until that point. It also would involve a remarkable coincidence: At the very instant Sailors fell, someone just happened to switch on the lights; and this just happens to be the only way the lighting level could turn out to have been below 0.2 at the time of the accident. We conclude Moore's statements on this topic could not constitute substantial evidence justifying a reasonable factfinder in finding the lighting to be inadequate at the time of the accident.

In addition to his expert, Sailors relies on eyewitness deposition testimony to support his contention that there was a triable question about the adequacy of the lighting. Natalie G., a student, described the parking lot as somewhat dark, Glenn Sailors said it was pitch black, and Damian H. said "maybe" when asked if darkness could have contributed to the accident. Yet all three were able to describe what they saw in the parking lot that night. The teacher Pamela Brem testified that she recalled the light being too dim in the parking lot when she attended the FFA conference in prior years, but this was not relevant to the lighting level at the time of the accident.

C. Summary

To summarize the foregoing, we conclude as follows: (1) The evidence could not support any finding that the damaged spot in the pavement was more than half an inch deep, putting aside the crack that was 13/16 of an inch deep but not of such a size or in such a location as to be materially related to the accident; and a vertical displacement of half an inch was within the range determined by case law to be trivial for a defect in a walking surface, assuming no aggravating factors. (2) Sailors did not produce evidence capable of showing that the applicable standard of care required a lighting level brighter than 0.2 foot-candles, a level effectively conceded by defendants' expert to be the minimum necessary for safe walking. The expert opinion on which Sailors relied, proposing various higher standards, lacked foundation, as it was not supported by the

materials on which the expert relied. (3) Sailors did not produce evidence capable of showing that the actual lighting level at the time of the accident was less than 0.2 foot-candles, even when we credit, as we must at the summary judgment stage, the eyewitness testimony that only five or six bulbs were lit. Sailors's expert measured no level lower than 0.2 foot-candles, except when the lights were on for less than two minutes and were still warming up, yet Sailors had no evidence to counter defendants' evidence (i.e., Sailors's own testimony) that the lights had been on for at least five minutes when he fell. If the lights had been on for at least five minutes, then Sailors's expert's own measurements indicated that the level was 0.2 foot-candles or more, even if five bulbs were unlit. Sailors's expert's theory that the lights were not on at all until the moment Sailors fell was speculative. The eyewitness testimony that the light in the parking lot was dim—but not so dim as to prevent the witnesses from seeing the things they were asked about in their depositions—also was not sufficient to raise a triable question about the adequacy of the lighting. (4) The consequence of (2) and (3) is that Sailors failed to produce evidence sufficient to raise a triable question of whether the lighting conditions were an exacerbating factor rendering the defect nontrivial. (5) The evidence regarding the shape and angle of the damaged spot's edges was not sufficient to raise a triable question of whether the edges were an exacerbating factor rendering the defect nontrivial. Other than this and the lighting, there was no evidence of aggravating factors. (6) For these reasons, defendants were entitled to summary judgment in their favor.

Sailors advances one more argument for reversing the summary judgment that we have not addressed yet. This argument is related to defendants' argument for reversal of the trial court's denial of their motion for costs of proof. It will be convenient to delay our explanation of why Sailors's remaining argument is unavailing until after we discuss the costs of proof issue.

II. Sailors's Costs Appeal

Sailors points out that the body of the trial court's written order on his motion to tax costs included taxed items totaling $6,800.47, but the amount the court actually ordered to be taxed was only $4,550.93. Sailors asserts that this is the result of a mere mathematical error, which we should order corrected. Defendants do not deny that it is the result of a mere mathematical error, but argue that Sailors forfeited the point by not raising it below.

We conclude that this error is a clerical error subject to correction by us at any time, and thus not subject to forfeiture. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 62-63.) If it were subject to forfeiture, we would exercise our discretion to review the forfeited issue. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) It would be absurd to refuse to correct a conceded mathematical error in a costs order. The corrected figure is shown in the disposition below.

Sailors also argues that Reef-Sunset, which was pursuing subrogation against defendants, should have been included in the amended judgment as another obligor having joint liability. This contention was not raised in the trial court, which denied Sailors's motion to apportion the costs between Sailors and Reef-Sunset, but did not address the question of whether they shared liability for the entire amount jointly. It entered judgment against Sailors alone for costs. Sailors asks us to order the trial court to enter a new judgment including Reef-Sunset as a joint obligor.

Reef-Sunset is not a party to any of these appeals. It has not made an appearance in this court in these matters. No one claims its absence is due to any sort of fault on its part. All parties before us have interests hostile to Reef-Sunset's interests, for Sailors and defendants all would benefit from having another party against which the judgment for costs potentially could be satisfied.

We are aware of no authority, and Sailors cites none, that would allow us to impose liability on a nonparty to an appeal under circumstances like these, and we will not do so. Sailors cites cases in which it was held that a trial court properly amended a judgment to add a party as a judgment debtor *where a party already named had been proved to be an alter ego of the party added*, so the added party's interests had been represented at every stage by the alter ego (an alter ego being in reality inseparable from the party of which it is an alter ego). (See *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 149; *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 45.) These cases are inapposite; Reef-Sunset obviously is not an alter ego of Sailors or vice versa, and they each have a right to defend their own interests.

We are also unable to grant Sailors's alternative request to remand the issue to the trial court with directions to decide it in the first instance with Reef-Sunset's participation, upon a motion by Sailors to amend the judgment. Even this relief would decide an issue (whether a motion to amend the judgment is a proper post-appeal vehicle for adding a judgment debtor to a judgment) against Reef-Sunset, in the first instance in this appellate proceeding to which Reef-Sunset is not a party. Given Reef-Sunset's absence, we can make no alteration in its position, just as if the appeal were dismissed. We express no opinion about what relief, if any, may now be available to Sailors on this issue in the trial court.

III. Defendants' Costs Appeal

Defendants' motion for costs, including attorneys' fees, incurred in proving matters Sailors purportedly should have admitted in response to defendants' requests for admission (RFAs), was based on Code of Civil Procedure section 2033.420. That statute provides:

> (a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party

> requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.
>
> (b) The court shall make this order unless it finds any of the following:
>
> > (1) An objection to the request was sustained or a response to it was waived under Section 2033.290.
> >
> > (2) The admission sought was of no substantial importance.
> >
> > (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.
> >
> > (4) There was other good reason for the failure to admit.

In denying the motion, the trial court concluded that the matters defendants asked Sailors to admit were not proved, or there were reasonable grounds to deny them. We review the ruling for abuse of discretion. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275.) As we will explain, the trial court acted within the scope of its discretion.

Defendants' fundamental premise in challenging the ruling is that Sailors should have admitted all facts (or the negation thereof) as to which the trial court's summary judgment order explicitly or impliedly found he had failed to raise a triable issue. An alleged fact as to which a triable issue has not been raised is one a reasonable factfinder could not find true by a preponderance of the evidence submitted by the parties making and opposing the summary judgment motion. So, the argument goes, if Sailors could not respond to defendants' evidence by submitting evidence sufficient to raise a triable issue regarding a given alleged fact, then he never had reasonable grounds to believe he would prevail as to that alleged fact, and defendants are entitled by Code of Civil Procedure section 2033.420, subdivision (b)(3), to recover the cost of proving or disproving it, as the case may be. This may (or may not) be sound in the abstract, but to see if it could

warrant disturbing the trial court's decision here, we must examine the particular RFAs on which defendants' appellate argument is based.

In their opening brief on this issue, defendants list 24 RFAs that, according to them, they proved in the summary judgment proceedings and Sailors denied without reasonable grounds. We have rearranged these for expository purposes and placed them in several groups.

The 14 RFAs in the largest group all begin with "Sailors has no evidence that. . . ." These are a special case that we will deal with last. The remaining three groups relate to the damaged spot in the pavement, the lighting conditions, and the damaged spot and lighting conditions in combination.

Group 1: The damaged spot in the pavement

Defendants discuss four RFAs on this point, which we will examine in turn.

RFA No. 28

> "The presence of the IMPERFECTION at the time of the ACCIDENT constituted a trivial defect as a matter of law"

We say the question of a defect's triviality or nontriviality is determined by the trial judge as a matter of law, but that does not mean every reasonable lawyer (let alone every reasonable person) should be able to predict a court's conclusion in every case of this kind. It is an uncomfortable fact, but a fact nonetheless, that some questions of law, in some cases, have multiple reasonable answers. Given the detail-intensive nature of the legal analysis under the trivial defect doctrine, and the lack of bright lines, we think the trial court had discretion to find Sailors had a reasonable basis for denying that the damaged spot was a trivial defect, even though the court thought it was one, as we do. A depression half an inch deep with a 13/16 of an inch crevice in the middle, with irregular 90 degree edges: Was there only one reasonable prediction of which way the trial court would go?

RFA Nos. 19, 20 and 36

> "At the time of the ACCIDENT the IMPERFECTION did not pose an unreasonable risk of harm." (No. 19)
>
> "At the time of the ACCIDENT the IMPERFECTION did not pose a substantial risk of injury to members of the general public." (No. 20)
>
> "The presence of the IMPERFECTION at the time of the ACCIDENT created no more than a minor risk of injury."

The reasonableness of denying these RFAs follows from the reasonableness of denying RFA No. 28. If the damaged spot was a nontrivial defect, it arguably presented an unreasonable risk, a substantial risk, and more than a minor risk, with or without additional facts, such as inadequate lighting.

Group 2: Lighting

Defendants identify three RFAs on this topic.

RFA No. 39

> "At the time of the ACCIDENT the level of lighting in the area of the IMPERFECTION was adequate for walking in the area of the PARKING LOT at night."

The reasonableness of denying this RFA follows, once again, from the reasonableness of denying RFA No. 28. If the damaged spot was a nontrivial defect, Sailors could reasonably rely on the special lighting standard, cited by his expert, Moore, for places in which there are hazards requiring visual detection. The nontrivial damaged spot could be regarded as a slight hazard within the meaning of that standard. As stated above, if there is a low activity level in such a place, and the hazard is slight, the IENSA standard for lighting is 0.5 foot-candles; it is 1.0 foot-candles if the activity level is high. Sailors could then rely on Moore's light meter readings, all of which were below 0.5 foot-candles, and could conclude on this basis that the lighting was inadequate for walking at the time of the accident.

RFA No. 6

> "At the time of the ACCIDENT the light bulbs in the LIGHTING STANDARD [i.e., the light fixture on the pole] were illuminated."

This RFA is ambiguous. Does it mean all the light bulbs, or some of the light bulbs? Sailors testified that the light fixture was on when he entered the parking lot, and Anysa P. said it was on but some of the bulbs were not lit. Sailors could reasonably have interpreted the RFA to mean that all the bulbs were illuminated. Then he could reasonably deny it, based on Anysa P.'s testimony. Further, the court did not find, and did not need to find for summary judgment purposes, how many bulbs were lit, so if the RFA means all the bulbs were lit, then the matter was never proved.[6]

RFA No. 11

> "At the time of the ACCIDENT the light level in the area of the IMPERFECTION was at least .20 foot candle."

We agree with defendants that it is difficult to see a reasonable basis for denying this RFA. Sailors's own expert's measurements show a lighting level below 0.2 foot-candles only if the light fixture was on for one minute or less, and the only evidence of the amount of time from when the lights were first seen shining and the time of the accident was Sailors's own testimony that over five minutes passed between the time he entered the parking lot and saw the lights on, and the time he fell. Moore's declaration refers to a level of 0.189 foot-candles, but this figure is unexplained and foundationless; and in any case the difference between it and 0.2 foot-candles is immaterial because all the standards relied on by the parties are given in their authoritative sources only to one

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[6] Overlooking the ambiguity, the trial court found that RFA No. 6 was proved; but it also found that no significant amount of separable costs could be attributed to proving it, since Sailors's own deposition testimony had proved it already. We find RFA No. 6 was both reasonably denied and not proved; but we also agree with the trial court that if it were deemed proved, its proof involved no apportionable costs.

decimal place. Moore's theory that the lights could have been turned off until the moment of the accident was speculative.

At the same time, however, it is improbable that this denial had any material impact on defendants' costs of proof. Given the dispute over the applicable standard (and the potential reasonableness of relying on a standard of 0.5 foot-candles, as discussed in connection with RFA No. 39 above), defendants could not safely have refrained from sending their expert to take measurements even if Sailors had admitted the level was at least 0.2 foot-candles.

Group 3: Damaged spot and lighting combined

Defendants discuss two RFAs on the subject of the damaged spot and lighting conditions together, Nos. 22 and 24.

> "At the time of the ACCIDENT the IMPERFECTION coupled with the level of light in the area of said IMPERFECTION did not create an unreasonable risk of harm." (No. 22)

> "At the time of the ACCIDENT the IMPERFECTION coupled with the level of light in the area of said IMPERFECTION did not create a substantial risk of injury to members of the general public." (No. 24)

The reasonableness of denying these follows from the reasonableness of denying the similarly worded RFAs regarding the damaged spot and the lighting conditions separately, as discussed above.

Group 4: RFAs stating that Sailors had no evidence

The 14 RFAs stating that Sailors had no evidence of certain facts were as follows:

> "Sailors has no evidence that the existence of the IMPERFECTION at the time of the ACCIDENT was a substantial factor in causing said ACCIDENT." (RFA No. 25)

> "Sailors has no evidence that the presence of the IMPERFECTION at the time of the ACCIDENT created more than a minor risk of injury." (RFA No. 27)

"Sailors has no evidence that the depth of the IMPERFECTION at the time of the ACCIDENT was more than one-half of an inch below the surrounding surface of the parking lot where said ACCIDENT occurred." (RFA No. 29)

"Sailors has no evidence that the depth of the IMPERFECTION at the time of the ACCIDENT was more than three-quarters of an inch below the surrounding surface of the PARKING LOT where said ACCIDENT occurred." (RFA No. 38)

"Sailors has no evidence that at the time of the ACCIDENT the IMPERFECTION was something that a prudent person would want to see so they could avoid it while walking through the parking lot where said ACCIDENT occurred." (RFA No. 34)

"Sailors has no evidence that the presence of the IMPERFECTION at the time of the ACCIDENT did not constitute a trivial defect." (RFA No. 37)

"Sailors has no evidence that at the time of the ACCIDENT the level of lighting in the area of the IMPERFECTION was not adequate for walking in the area of the PARKING LOT at night." (RFA No. 30)

"Sailors has no evidence that at the time of the ACCIDENT the level of lighting in the area of the IMPERFECTION would have been inadequate for walking purposes if ten of the ten lamps in the LIGHTING STANDARD were illuminated." (RFA No. 31)

"Sailors has no evidence that at the time of the ACCIDENT the level of lighting in the area of the IMPERFECTION would have been inadequate for walking purposes if only six of the ten lamps in the LIGHTING STANDARD were illuminated." (RFA No. 32)

"Sailors has no evidence that at the time of the ACCIDENT the level of lighting in the area of the IMPERFECTION would have been inadequate for walking purposes if only five of the ten lamps in the LIGHTING STANDARD were illuminated." (RFA No. 33)

"Sailors has no evidence that at the time of the ACCIDENT the IMPERFECTION coupled with the level of light in the area of said IMPERFECTION created an unreasonable risk of harm." (RFA No. 21)

"Sailors has no evidence that at the time of the ACCIDENT the IMPERFECTION coupled with the level of light in the area of said

> IMPERFECTION created a substantial risk of injury to members of the general public." (RFA No. 23)
>
> "Sailors has no evidence that the existence of the IMPERFECTION coupled with the level of light in the area of said IMPERFECTION was a substantial factor in causing the ACCIDENT." (RFA No. 26)

Many of these RFAs were reasonably denied because similar RFAs omitting the "no evidence" phrasing were reasonably denied. For example, if it was reasonable to deny that "[t]he presence of the IMPERFECTION at the time of the ACCIDENT created no more than a minor risk of injury" (RFA No. 36), then it also was reasonable to deny that Sailors had no evidence of the same (RFA No. 27).

The assertions in two of these 14 RFAs, Nos. 25 and 26, were patently false. Sailors testified that the damaged spot in the pavement was what he tripped on. This was some evidence that the damaged spot was a substantial factor in causing him to fall, whether considered by itself (RFA No. 25), or together with the lighting conditions (RFA No. 26).

But there is a more fundamental reason why costs of proof should not have been awarded based on these 14 RFAs. Defendants rely on the fact that summary judgment was granted in their favor to demonstrate that the assertions in their RFAs were proved. But to grant the summary judgment motions, the trial court did not need to find, and did not in fact find, that Sailors had *no* evidence on any particular point. The question on summary judgment is whether the nonmoving party produced *sufficient evidence to raise a triable question* regarding the matters challenged in the motion for summary judgment—not whether the nonmoving party produced *any* evidence of those matters. Defendants thus have not demonstrated that the matters asserted in these 14 RFAs were proven.

Defendants point out that some of the evidence that supported Sailors's denials was not yet in Sailors's possession until after the denials were made. Assuming this is so,

it would mean Sailors was wrong to make the denials when he did, but we do not see how it could have had an impact on defendants' costs of proof. If Sailors had admitted the RFAs in question, he would have been obliged to amend his responses to deny them after he collected the evidence. At that point, defendants would have needed to incur the same costs of proof they actually incurred.

For all these reasons, we conclude that the trial court did not abuse its discretion when it denied defendants' motion for costs of proof under Code of Civil Procedure section 2033.420.

We deny Sailors's request that *he* be awarded his appellate attorneys' fees on the ground that defendants' appeal from the denial of its costs-of-proof motion is frivolous. We reject his contention that no reasonable attorney could have believed he or she would prevail in the appeal on this question.

Finally, we return to Sailors's remaining argument on the merits appeal, as mentioned above. Sailors maintains the converse of defendants' argument in their costs appeal: If the trial court correctly denied defendants' motion for costs of proof, it follows that the evidence supplied by Sailors afforded a reasonable basis for denying the propositions stated in defendants' RFAs, and this in turn means there were triable questions regarding those propositions, so summary judgment should have been denied.

The reasonableness of denying the RFAs in group one above depends on the facts that (a) the trial court decides as a matter of law whether the defect is trivial or not, and (b) different trial judges might reasonably reach opposing conclusions about that in this case. The reality that the court's decision on a question of *law* is unpredictable does *not* mean a triable question of *fact* exists.

The reasonableness of denying the RFAs in group two above also traces back to the status of the triviality question as a question of law. If a trial court could reasonably hold that the defect was nontrivial with respect to its magnitude, it could also conclude

that there was a triable question about whether the proper lighting standard was 0.5 foot-candles instead of 0.2 foot-candles, because the nontrivial defect might also be a slight hazard, triggering the application of the 0.5 foot-candle standard for safety lighting in places with slight tripping hazards. But because the trial court held as a matter of law that the damaged spot in the pavement *was* trivial with respect to its magnitude, the hazard-lighting standard was inapplicable, and the applicable lighting standard could not be found to be greater than 0.2 foot-candles based on the evidence submitted; and because the evidence could not support a finding that the lighting level was less than 0.2 foot-candles, there was no triable question of whether the lighting was an aggravating factor rendering the defect nontrivial.

The reasonableness of denying the RFAs in group three is merely a function of the reasonableness of denying those in groups one and two, so the ruling as to those also did not imply the existence of triable issues. As for group four, these RFAs could not be a basis for an award of costs of proof simply because the propositions asserted in them (that Sailors had no evidence on various points) were not proved in the summary judgment proceedings. The failure of these to be proved means it remained possible that Sailors had *some* evidence—more than none—relevant to those points. But that is consistent with the conclusion that he failed to submit evidence *sufficient to raise a triable question*.

Consequently, the correctness of the trial court's denial of defendants' motion for costs of proof did not mean it also should have denied defendants' summary judgment motions.

DISPOSITION

The judgment is modified to reduce the costs awarded to defendants to $48,065.41, and affirmed with this modification. The parties are to bear their own costs

on appeal. The motion for judicial notice filed in case No. F075470 on October 2, 2017, is denied as moot.

_____
SMITH, J.

WE CONCUR:

_____
PEÑA, Acting P.J.

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DESANTOS, J.